No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE,
Appellant,

vs.

HERMAN L. MEYER, *et al*
Appellees

BRIEF FOR APPELLANT.

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Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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BRIEF FOR APPELLANT.

I.

Statement of the Case.

On August 19, 1907, appellees chartered the French bark. "Duc d'Aumale" from appellant, her owner, to carry a cargo of coke and pig iron from Rotterdam to San Francisco. Before loading she was surveyed by two experts appointed by the French consul at Rotterdam, also by the surveyor to the Bureau Veritas, and also by the agents of the owner. After all of these had pronounced her in every respect seaworthy, she was loaded with 2015 tons of coke and 660 tons of pig iron. 600 tons of the pig iron were stowed in the lower hold, between the after part of the main hatch and the

forward part of the after hatch, in a pile 63 feet long, 3 4/5 feet high, 36 feet wide at the forward end and 29 1/2 feet wide at the after end. Appellees were the shippers of the cargo at Rotterdam and receivers at San Francisco. The vessel sailed from Rotterdam on September 19th, and was towed to Brest, where she arrived on September 22nd. She sailed from Brest on September 24th for San Francisco. The weather was fair and the sea calm until September 26th when the ship encountered bad weather in which she labored very much (197). On the afternoon of the 28th, when the ship was in latitude 38° 28′ north, 17° 14′ west, sounding disclosed that there were 23 centimeters of water in the hold, and that this water rose steadily at the rate of one centimeter per hour (164), showing a serious leak and necessitating the daily use of the ship's pumps. She did not put into a port of refuge for repairs, but continued on her long voyage to San Francisco via Cape Horn. The pumps were worked every day for nearly two months, until the 22nd of November, when the ship had arrived at 49° 37′ south latitude, and 66° 21′ west longitude (165), in the neighborhood of Cape Horn where storms are the ordinary and expected perils of navigation. On the last mentioned day she encountered the first storm since she had commenced leaking; it then became impossible to operate the pumps, the leak increased and she filled rapidly. The master, finding it impossible to reach

(Note.—Figures in parentheses refer to pages of Apostles.)

Port Stanley with his sinking ship, made for the Falkland Islands, where the ship was beached at Roy Cove on November 25th. There she remained aground until the 13th day of February following. She was lying in mud about 5 feet deep (172), and there was 14 feet of water in her hold (169). The cargo was submerged for about three months. The ship was finally towed to Port Stanley where she remained until April 5, 1908. From there she proceeded under her own sail to Montevideo, and thence to Buenos Ayres where she arrived on May 5th. There the cargo was discharged and the ship was placed in dry dock for repairs. On examination it was found that one rivet was gone from a point on the starboard side about one meter forward of the mizzen mast, about one foot from the keel, and several other rivets were loose and leaking (179, 180). The plates in the after part were bent, and the cement was broken in the butt ends of several plates. After the ship was repaired in Buenos Ayres, her cargo was again taken aboard, and she sailed for San Francisco on July 6th, arriving there on November 19, 1908.

On arrival the coke cargo was found badly damaged by reason of the salt water saturation. The charterers refused to pay the freight, whereupon the owners commenced proceedings to enforce their lien for the freight. The charterers libeled the ship on a claim for damage to their cargo.

The two actions were consolidated for the purpose of trial and were tried as one.

The propriety of appellant's right to the freight on the cargo was not denied or contested in the action of the owners for the freight (476). The amount of this freight was found by the Court to be the sum of $17,389.42 (477); but this amount was found to be more than offset by the damages for cargo injuries found due to respondents from appellants. Accordingly a decree was entered dismissing appellant's libel for freight (475), and a final decree was entered in favor of respondents, and against appellants, in the sum of two thousand two hundred forty two 72/100 dollars ($2242.72), together with interest at 7% (477, 480), the latter sum being the excess of respondents' damages for cargo injuries over and above the freight due, making proper allowance for interest on the sums involved.

The sole issue raised by the pleadings is that of the *seaworthiness of the ship,* as to hull and stowage of cargo when she left Rotterdam at the beginning of her voyage. If she was then unseaworthy *and* her owners failed to use due diligence to make her seaworthy, the final decree as rendered should be affirmed; if, on the other hand, the ship was seaworthy when she left Rotterdam, or her owners had used due diligence to make her seaworthy, the appellant is entitled to a decree for the full amount of its freight, and the respondents' libel for damages should be dismissed.

II.

Calendar of Events.

For the convenience of the Court we append the following calendar of events bearing upon this case:

1907.	Aug. 19.	Date of charter party.
	Aug. 27.	Survey of ship in drydock at Rotte dam by two experts (Beaudry and Roy) appointed by the French consu
	Aug. 27.	Survey in drydock by expert Bureau Veritas (Van Veen), with Ca tain Plisson, Captain Girard, and t foreman of the drydock company.
	Sept. 1/16.	Loaded at Rotterdam.
	" 17.	Date of certificate of good stowage, Expert de Yonge.
	" 19.	Sailed from Rotterdam.
	" 22.	Arrived at Brest, France.
	" 24.	Sailed from Brest.
	" 29.	Discovery that ship was leaking.
	" 29/Nov. 22.	Ship continues on regular course voyage towards Cape Horn.
	Nov. 22.	Violent gale in neighborhood of Fal land Islands. Leak increases and sh begins to sink.
	Nov. 25.	Beached at Roy Cove, Falkland I lands.
	Nov. 25, 1907. Feb. 13, 1908.	Ship lies beached at Roy Cove, part submerged.
1908.	Feb. 13.	Left Roy Cove for Port Stanley, tow of tug.
	" 17.	Arrived at Port Stanley.
	Apr. 5.	Left Port Stanley in tow of tug "Sar son"; then sailed under her own sa for Montevideo.

Apr. 17.	Arrived at Montevideo.
Apr. 17/May 2.	At Montevideo.
May 3.	Left for Buenos Ayres.
May 5/July 18.	In Buenos Ayres, repairing.
July 18.	Sailed from Buenos Ayres.
Nov. 19.	Arrived in San Francisco.

III.

Appellant's Points and Authorities.

It may be helpful to the Court to introduce appellant's argument by a classification of the various cases that may arise governing the responsibility of a ship owner for the ship's cargo where fault on the part of the captain in her navigation is an element. With reference to the question of the carrying ship, and the cause of the damage, the following cases may arise:

Case 1. The ship is in fact seaworthy on leaving port; the owner had used due diligence to make her so; and the cause of subsequent damage to cargo is fault in her navigation.

In that case the shipowner is not liable (Harter Act. sec. 3).

Case 2. The ship is in fact seaworthy on leaving port, although the owner had not used due diligence to make her so; and the cause of subsequent damage to cargo is fault in her navigation.

In that case the shipowner is not liable, seaworthiness in fact being at least as good as due diligence to make seaworthy.

Case 3. The ship is in fact unseaworthy on leaving port, and the owner did not use due diligence to make her seaworthy; and the cause of the damage is the unseaworthiness.

In that case the shipowner is liable, the damage being caused directly by his fault.

Case 4. The ship is in fact unseaworthy on leaving port, and the owner did not use due diligence to make her seaworthy; and the cause of the damage is fault in navigation.

In that case the shipowner is liable for the damage caused by the fault of his servant.

Case 5. The ship is in fact unseaworthy, *but* the owner has used due diligence to make her seaworthy; and the cause of the damage is the unseaworthiness.

In that case the *shipowner is liable,* unless his liability has been reduced by contract to the measure of due diligence (*The Carib Prince,* 170 U. S. 655).

Case 6. The ship is in fact unseaworthy, *but* the owner has used due diligence to make her

seaworthy; and the cause of the damage is fault in navigation.

In that case the shipowner is not liable (Harter Act, sec. 3).

Appellant's contention is that the facts of the instant case bring it either within *Case 1,* or within *Case 6* above outlined.

Appellant's contentions are the following:

First. The ship was in FACT SEAWORTHY on leaving Rotterdam.

Second. Assuming that the ship was not in fact seaworthy on leaving Rotterdam, the evidence shows that the owner USED DUE DILIGENCE to make her seaworthy.

Third. Assuming that the ship was not in fact seaworthy on leaving Rotterdam, but that the owner used due diligence to make her seaworthy, appellant is not liable for the reason that THE PROXIMATE CAUSE OF THE DAMAGE WAS FAULT IN NAVIGATION.

FIRST. THE SHIP WAS IN FACT SEAWORTHY ON LEAVING ROTTERDAM.

1. *Presumption of seaworthiness.* "In the absence of proof to the contrary, a vessel will be presumed to be seaworthy" (*The Chattanoochee,* 173 U. S. 540, 550). Appellant may start, therefore, with the presumption that the barque was in fact

seaworthy at the commencement of her voyage from Rotterdam. This would necessarily assume that the diligence to secure seaworthiness, required by the Harter Act, had been exercised. The burden of proving unseaworthiness as a fact rests upon the party who asserts it, viz. upon appellees. Appellees must not only combat the effect of the presumption of seaworthiness, but must show by a preponderance of evidence that the barque was unseaworthy. The only evidence tending to overcome the presumption of seaworthiness and to show, in favor of appellees, that the damage complained of was caused by unseaworthiness, is the fact that she began to leak on September 29th, nine days after she had sailed from Rotterdam. From this fact the Court below drew the inference that she was unseaworthy at the time she sailed, stating: "Where a vessel soon after leaving port becomes leaky without stress of weather or other adequate cause, there is a presumption of fact, or rather an inference from the fact of leakage, that she was unseaworthy at the time she sailed". Down to this point the balance of evidence is this: Appellees have, as evidence in their favor, this inference of fact; appellant has the presumption of law in favor of seaworthiness. The burden of proof has not, however, shifted from appellees. The inference of fact, drawn in their favor, is some discharge of the burden resting upon them; but if the weight of this inference were considered as exactly equal to the weight of the

legal presumption in favor of appellant, the effect would be that appellees have not sustained their burden of proof, so that a decree should be rendered in favor of appellant. In the absence of further evidence on this issue of seaworthiness the Court might, however, be warranted in making a finding that appellees have successfully discharged their burden of proof; and that the preponderance of proof on this issue in in their favor. It is exactly for this reason that appellant was not satisfied to rest its case upon presumptions and inferences, but made actual proof in the matter of the seaworthiness of the barque (on this subject see *Scrutton, Charter Parties*, page 82, note 3).

2. *Evidence of seaworthiness.* The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is attributable to the ship or her owners.

36 Cyc., 249.

A. Seaworthiness of the Hull.

Before the ship loaded her cargo, the French consul at Rotterdam appointed two experts (Le

Roy and Beaudry) to survey her. These experts accepted the appointment, took the oath required by French law, and, on August 27, 1907, made their report (124-126). In addition to the survey of these official experts, the vessel was carefully examined by Plisson, the general inspector of the ships of the company and their stowage, and his assistant Girard; also by the surveyor of the Bureau Veritas who made a survey of the ship for classification purposes (96). It is well known that a classification survey (on which the class of the ship for insurance purposes depends) is more thorough than a survey made merely for the purpose of determining whether the ship is fit for the particular voyage contemplated. The seaworthiness of the vessel was also tested by the employees of the dry dock company. An abstract of the work of these surveyors follows:

Beaudry.

> "At the request of the French Consul I was appointed as surveyor on board the 'Duc d'Aumale' with Mr. Le Roy, Captain for the world trade. * * * I inspected the deck, masts, hold, ceiling, cement of the bottom and the accessory pumps, as well as re-exchange of the 'Duc d'Aumale', and found everything in perfect order. * * * I went on board the 'Duc d'Aumale' the 27th August, 1907; together with Mr. Le Roy, Captain for the world trade; and Mr. Girard, overlooker * * *. The result of my examination was that the vessel was in perfect seaworthiness" (146-147).

"I state under oath that I examined all visible rivets in the hull and that I found none of them bad" (cross-examination, 148).

Le Roy.

"After having gone on board, at the request of the French consul, and in the presence of Mr. Girard, overlooker, and Mr. Allemand, world trading Captain, acting by the time as ship's master, I went down the hold to look and sound attentively the ship's sides, as well as the frames and stiffeners of all kinds binding the plates between each other and I let work the pumps, which were in good order. * * * The result of the examination was, from every point of view, in favor of the ship, giving me full satisfaction. The 'Duc d'Aumale' was in a perfectly state of navigability" (150).

On cross-examination:

"With the help of a hammer, I have sounded inside the vessel all accessible rivets including the hull's ones. * * * I could not examine all the rivets of this vessel as she had some goods into the hold, but I let shift, on various places, these goods, and I verify that the plates were very dry and felt no trace of rust caused by unstanched rivets. * * * I have examined these rivets with a hammer and tried in vain to shake them with my hand" (151-152).

Plisson.

"I have surveyed the building of the 'Duc d'Aumale' so as of all the other vessels belonging the Compagnie Maritime Francaise and I have followed her returns to Europe every time. I examined her in dry dock and inspected the stowage of her cargoes. * * *"

"During the stay of the 'Duc d'Aumale' at Rotterdam I have attentively examined all her parts during three days from 4th to 6th September, as well afloat as in dry dock, in company of Mr. Girard, the internal survey of the hold did not let me discover anything wrong. The frames, bracket plates, beams, floor plates, and cement at the bottom of the hold, as well as the inside riveting were in a perfect state. In dry dock, where the ship survey of the little bottom was passed by Mr. Van Veen, Veritas Agent, Mr. Girard, and dry dock foreman, and me, we found two defective rivets, which were at once renewed; some butts were joined with mastich; the remainder of the hull riveting, butts, was in perfect state. * * * In my opinion, having surveyed the building of the 'Duc d'Aumale' and inspected her several times, I dare say that said building was perfect and in a good keeping state on departure from Rotterdam in September, 1907 * * *" (128-130).

Cross-examination:

"The first examination was made by me on the dates of 4th and 5th September when the vessel was afloat. I made the second inspection on dry dock, the 5th and 6th September. * * * I have personally and thoroughly examined all small bottom keel plates and butts, rivets" (137).

Girard.

"I have examined the 'Duc d'Aumale' with the greatest attention in all her parts; I found her in perfect state except some defects in the hull and rudder have been repaired in dry dock. * * * The hull has been inspected in dry dock with the greatest care; two defective rivets have been renewed and butts were

filled with putty * * * (140-141). I have accompanied in the examination of the ship in dry dock Messrs. Plisson, Van Veen, Bureau Veritas Rotterdam Agent, and the foreman of the (dry dock company). I have examined the 'Duc d'Aumale' during my stay at Rotterdam and specially the 4th, 5th, and 6th, September, afloat and in dry dock. * * * After a very particular examination, specially of the rivets, I only saw to be made the repairs mentioned in the Sixth Interrogatory, the remainder being in a perfect state" (143).

Van Veen.

"I thoroughly examined and surveyed the hull of the 'Duc d'Aumale' in dry dock at Rotterdam on the 6th of September, 1907, for classification purposes. * * * I examined the whole of the hull of the vessel and in particular the bottom with all butts, seams, and rivets and the rudder. I found the whole after hull in excellent condition with the exception that I found two rivets corroded and they were renewed and the rudder rebushed" (96).

Cross-examination:

"The 'Duc d'Aumale' was lying in a dry dock of the Rotterdam Dry Dock Company when I examined the 'Duc d'Aumale'. I did the whole examination and survey personally on the 6th of September, 1907, in presence of Mr. Plisson, a representative of the owners, and Mr. Van den Berg, assistant manager of the dry dock company. I examined the rivets in the hull and bottom by going along the ship and under the bottom, and it is quite easy to see whether the rivets are sound or not. * * * As surveyor for the Bureau of Veritas, it has been my daily occupation for the past sixteen years to survey and examine hulls and bottoms of iron and steel vessels" (97-98).

Van den Berg.

"I personally always examine all the vessels that come in the Droogdok Maatschoppij. Be cause the 'Duc d'Aumale' was there in September, 1907, according to the books I must have examined her myself. After the books the bottom and hull have been accordingly examined also by my staff of workmen. All the rivets suspected to be bad have been marked and were tested afterwards; two of them were renewed, the rest proved to be sound, * * * As the costs of repairs include a larger profit for our company than dock rent, we always inspect ships very accurately. All defects discovered must have been repaired, because this is always done. * * * I don't remember personally any more whether the 'Duc d'Aumale' at the moment of her departure was seaworthy. As I examined all vessels personally as to the rivets, rudder, plates and the hull, the ship at the moment of her departure must have been seaworthy for a deep sea voyage as far as the hull is concerned" (101-102).

Cross-examination:

"I always personally examine the whole bottom and hull and order my staff to test the rivets and plates which I suspect to be bad. These rivets are tested in the usual way, i. e., by knocking with a hammer. * * * The condition of the rivets can be ascertained by looking at them; this I do always. I order my staff to test all of these which appear to be doubtful" (102-103).

These abstracts from the testimony show that the "Duc d'Aumale" was inspected, before her departure on the voyage, by an unusual number of

competent experts, and was found seaworthy. It may be admitted that, "if a vessel, immediately after sailing, should make water rapidly through a hole in her hull in a smooth sea * * *, the conclusion would be irresistible that she was defective at the time she sailed, notwithstanding she may have been inspected and pronounced seaworthy by competent and skilled surveyors" (Opinion, p. 464). But in this case the circumstances are different. This vessel did not make water immediately after sailing, but nine days after sailing from Rotterdam, and four days after leaving Brest. Before leaking she had run into bad weather. According to one of appellee's own witnesses it was "a moderate gale" (255), with cross seas (256); according to another it was "between fine weather and a moderate gale, with a heavy cross sea" (272), and not the usual weather, but "a little extraordinary" 272). Certainly, under such circumstances, the conclusion is not irresistible that the ship was defective at the time she sailed. The strain produced by a cross sea would reasonably account for the loosening of a rivet in the bottom. The evidence shows that, when the leak first commenced, it was not due to a rivet which had fallen out, but to a slighter cause. It is impossible to fix with certainty the original cause of the leak; but the cross seas recorded cause such pitching and rolling of a vessel as will naturally produce the result which happened in the instant case. Another reasonable

explanation is that the loosening of the rivet was caused by the impact of a floating obstruction.

It is shown in evidence that every reasonable precaution was taken to ascertain if any defective butts or rivets were in existence. It is common knowledge that, if a butt or rivet shows the slightest inclination to be defective, this becomes apparent by a slight rust forming in the vicinity of the part affected. An expert like Van den Berg, looking for indications of defects, cannot fail to detect them. It is also proper to keep in mind the proverbial thoroughness, carefulness and conscientiousness of Dutch surveyors.

When all is done that human care can do it is fair to presume that this ship, when she left on her voyage, had no defects in her bottom, but that the defect which was discovered nine days later was caused by an agency which operated upon the leaking rivet during the heavy weather of September 28th.

In the light of the positive evidence the fact that a leak was discovered nine days later should not be used as a basis for the mere inference that the leak existed in fact nine days before. There are many convincing reasons why ships are not likely to be sent to sea, on a voyage around the Horn, in a leaky condition. And there are very natural, and simple explanations of leaks occurring in the hulls of vessels. Apart from the effect of strains caused by rolling and pitching in heavy

weather, contact with a floating obstruction is a far more probable cause for the loosening of a rivet and consequent leak than the assumption that lives and property would be recklessly exposed to destruction in a ship which is negligently permitted to sail with a hole in her bottom on a long journey through well-known storm centers.

B. Seaworthiness as to Stowage.

The charter-party of the "Duc d'Aumale" is printed in the usual form used by appellees, and required the ship to proceed at Rotterdam to a dock and or river, as Charterers or their agents shall direct, and there load *in the customary manner* from the agents of the Charterers * * * "Vessel to be loaded subject to Lloyds or Board of Trade *usual rules* and restrictions" * * * "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, * * * to be furnished to Charterers from Lloyd's or other competent Marine Surveyor" * * * Owners agreeing that vessel shall be loaded as carefully as possible and Owners and Captain to be alone responsible for stowage of cargo and trim of vessel * * *". "The Master is to employ such Stevedore at port of loading as named by Charterers or their Agents, ship paying current rate." * * *

The stevedores being named by the Charterers themselves, it follows that, in so far as the selection of the stevedores is concerned, appellant used conclusively due diligence to make the vessel sea-

worthly as to stowage. Presumably appellees selected and named competent stevedores; at any rate they are estopped from denying that the stevedores who loaded the "Duc d'Aumale" were experienced or competent, and that appellant used due diligence to make her seaworthy as to stowage.

Even though theoretical stowers at San Francisco may discover *ex post facto* reasons why the cargo should have been stowed differently, the principle which governs this question is:

> "Where goods are stowed *in the customary way, and according to the best judgment of experienced stevedores,* the fact that, if they had been stowed differently, the injury sustained might have been avoidable does not make the carrier liable * * *."
>
> *36 Cyc.,* 251.

The cargo was stowed by practical experts who were unusually familiar with the stowage of similar cargoes customarily exported from Rotterdam, and these experts followed a judgment born from such experience and based upon the customs of the port.

The burden of proof to establish improper stowage as contributing to the strain upon the vessel, and thereby to the resulting injury to cargo, is upon appellees. There is in the record no evidence sufficient to sustain a finding that the cargo was improperly stowed—much less a finding that improper stowage was the cause of or contributed to the damage to the cargo.

> "Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowing the cargo, and the mere fact that if it had been differently distributed, the ship would have been more easy, does not necessarily show that the cargo was neglegently stowed, that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage upon which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter."
>
> Judge De Haven in *The Musselcrag,* 125 Fed. 786, *788.*

In those cases where the sole injury consequent upon careless stowage would be an injury to the cargo, carelessness on the part of the master in stowing could be more readily inferred than in a case like the one at bar where the immediate effect of the poor stowage would be to strain the vessel, to open her sides, to imperil her safety and that of the lives on board. It is submitted that an assumption that the rivet in this case was loosened by a floating obstacle or some other peril of the sea is less violent than the assumption that its condition after the nine days at sea was due to original negligent stowage. It should also be kept in mind that in this case it is not proved or conceded as a fact that, had the weight of the cargo been distributed differently, the ship would

have been more easy—in fact the master's testimony shows the opposite (186); but even if it were conceded, this would not prove negligent stowage.

The contention of the cargo owners is that the cargo was stowed by the stevedores whom they selected in such a manner as to produce excessive strain on the hull, and, as a consequence thereof, the leak which led to the ultimate disaster.

The 600 tons pig iron were stowed in that part of the vessel's hold where its strength and breadth are greatest; the pile covered a length of 60 feet, between main and after hatch. It had a mean height of about 1 meter 10 centimeter (3⅘ feet) (130-131). (Respondent's "Exhibit 7", Stowage Plan, where, however, the stern-most parcel of pig iron in the hold should be 70 tons instead of 270 tons, as erroneously marked.) The rest of the cargo space was entirely filling with coke (130).

The evidence shows that the method of stowage of a ship is dependent upon experience and acquaintance with the particular ship. There are certain rough rules which, generally speaking, fit the average case approximately; but a knowledge of the individual ship, with her idiosyncrasies, her shape, her fineness, etc., is the chief factor that must determine proper stowage in each individual case.

The stowage was performed by stevedores appointed by appellees (and whom the evidence shows to be experts in their business), under the supervision of Captain Plisson, the veteran

inspector of the company, Captain Girard, his assistant, and of Surveyor de Yonge.

The master's own opinion that the vessel was perfectly stowed is based upon "the way in which the ship behaved at sea" (186). No better test could be applied.

Deddes, a marine surveyor of Rotterdam, and member of the Court of the Dutch Board of Trade, who knows the type of vessel to which the "Duc d'Aumale" belongs, and has had experience in loading vessels of this type, expressed it as his expert opinion that the stowage of the vessel was a good and efficient one, and that the ship was seaworthy as far as stowage is concerned (77).

Y. de Yonge, a marine surveyor at Rotterdam, had extraordinary experience with iron and wooden sailing vessels, and had held about 2000 surveys on river and sea-going craft (84), in particular surveys of the stowage of many sailing ships which left Rotterdam after the San Francisco earthquake with coke and pig iron. He was familiar with the construction of the "Duc d'Aumale" and her dimensions generally so far as was necessary for the purpose of stowing the vessel; he issued her stowage certificate and testifies:

> "She was perfectly loaded, and as far as concerns the stowage perfectly seaworthy, in fact, the very ship a sailor likes because such a cargo cannot shift and is a minimum risk for burning, as it produces no gases, and the additional pig iron made the vessel stiff enough to carry sail much better than coke alone."

Van Veen, surveyor for the Bureau Veritas, testifies, referring to the method of stowage of the "Duc d'Aumale":

> "I know that this method of stowing *was and still is the usual method of stowing vessels of the type of the 'Duc d'Aumale', with such a cargo.* Mr. A. A. Hoogerwerff, who stowed the 'Duc d'Aumale', has had a very large experience of stowing such cargoes in similar vessels, and I am sure that he would not stow such a cargo improperly" (97).

Plisson, the inspector of the company, who superintended the stowing of the cargo, testifies that the stowage, as it was actually made, gave the vessel her proper sheer (trim); that the heavy pig iron was placed in the strongest part of the hold to minimize the strain; that by this distribution the center of gravity was lowered to the proper point and that thereby heavy straining and violent rolling were minimized and the stability increased (130-132).

Referring to the distribution of the coke and pig iron in the ship he says:

> "The division was made in accordance with the good stowing and right sense rules concerning our ships, which are all built on the same shapes. Owing to the fine lines, they can't, being empty, stand up without having in the hold a minimum dead weight of 300 tons. In these conditions, when the vessels are loaded with a similar cargo to the 'Duc d'Aumale' one, you can't leave in the hold less than 600 tons pig iron to give them good stability with a full cargo of coke or other like goods * * *. Two ships of the same dead weight

taking a similar cargo may have a very important difference in their weight division * * *'' (133-134).

The testimony of these witnesses is confirmed by Captain George Ledru, the master of a vessel of nearly the type of the "Duc d'Aumale" (56-70), who testifies that in his judgment the vessel was properly stowed.

The testimony of all these practical experts, some of whom were actually engaged in the work of loading the ship, is conclusive upon the question of the proper stowage. The port of Rotterdam, in which the ship was loaded, has a monopoly of the kind of cargo stowed in this kind of ship, and the stevedores and surveyors of Rotterdam have, therefore, unusual experience in the stowage of this kind of cargo in ships like the "Duc d'Aumale". They base their opinion as to the propriety of the stowage upon this actual experience, and their familiarity with the type and form of this vessel, and upon their knowledge of the effect of stowage upon the stability and the power to steer and manoeuvre the ship in a seamanlike manner. The great object of the practical stower is to fix the center of gravity in a given ship, and this can be determined only by those who have familiarity with the ship and the manner in which she carries different kinds of cargo.

Confronted with this overwhelming testimony by witnesses who possess first hand knowledge of the fact, appellees offer nothing but assumptions and

theories of San Francisco experts, who have no personal knowledge of the "Duc d'Aumale" nor practical knowledge of methods of stowing—least of all those prevailing at the port of Rotterdam; but the loading of a ship by theory and *ex post facto* criticism does not appeal to the common sense on a question which of necessity involves the experience and customary methods of the loading port. Even theory, however, demonstrates that the binding strain, which would have been brought to bear on the hull of the "Duc d'Aumale" would have been far greater had she been entirely loaded with coke equally distributed, instead of being loaded, as she was, because the sagging strain caused by the weight of the heavy pig iron in the hold of the ship is calculated to counteract the strain produced by the coke.

But assuming—for the sake of argument—that the "Duc d'Aumale" was not properly stowed when she left Rotterdam, on account of the distribution of her cargo, it would be difficult to appreciate the contention that such assumed unseaworthiness would make the owner of the ship liable for damage which the cargo suffered in this case. The distribution of the cargo did not affect the cargo itself in any way whatever. The pig iron was safe although the coke surrounded it, and the coke was safe although the pig iron was stowed in the particular place shown by the evidence. The only effect of the assumed improper distribution, claimed by appellees, is a strain upon the ship, as a result of

which the rivets or butts sprung. Granting this effect, the consequences of the improper distribution of the cargo extended to the 29th of September when the rivet in the bottom of the vessel was loosened. The cargo was safe at that time, and remained safe for two months. The damage to the cargo had no causal connection in a legal sense, with the assumed improper distribution. If, on the other hand, we look back from the fact of the damage to its cause, we come to a willful act of the master who, on September 29th, sent his leaking ship on a voyage into rough and dangerous seas instead of returning to the port of departure, or repairing to a port of refuge, as ordinary prudence should have dictated. There were numerous ports to which he could have taken his ship for repairs. It is a well known rule of legal causation that one fact cannot be considered the legal cause of a consequence, separated from it by the independent will of a human agency. In no sense, therefore, could any assumed improper stowage of the "Duc d'Aumale", when she left Rotterdam, be the legal cause of the damage complained of by the appellees.

C. The Presumption of Continued Seaworthiness Applies.

In *The Edwin L. Morrison,* 153 U. S. 199, the vessel took in water through a hole in her side, whereby cargo was injured. The question was, whether the injury was caused by perils of the sea, or by unseaworthiness of the vessel in the inception of the voyage. The Court found expressly:

"It is proper to note that no survey of the vessel was had" (p. 214), and then held:

> "If, however, the vessel *had been so inspected as to establish her seaworthiness,* when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached [viz., that at the time of the commencement of the voyage, the vessel was seaworthy] might follow, but we are of opinion that precisely here respondents failed in their case" (p. 214).

The rule laid down in this case is, therefore, that where a vessel was inspected before entering upon her voyage and found seaworthy, the presumption is that the seaworthiness continues until her departure from port. It is only where there was no inspection that the vessel must excuse herself if a leak occurs thereafter.

That such is the rule, is stated by Judge Lacombe in his dissenting opinion in *The Warren Adams,* 74 Fed. 413 (C. C. A.), whose language we quote:

> "There is nothing in the nature of the disaster, or in the subsequent appearance of the leaky seams, to indicate whether they were or were not well caulked before the voyage began. The rule laid down in the Edwin I. Morrison * * * seems to require the ship under such circumstances, to show *that before the voyage there was an inspection* of the part which subsequently gave way, with the known and ordinary tests, to ascertain whether or not it was in seaworthy condition. * * * Since * * * no inspection is proved, the schooner has failed to excuse herself, if the Morrison case is to be followed."

The presumption that a vessel, after she has once been found seaworthy, continues seaworthy until the beginning of the voyage is a presumption of law. On the other hand the rule that, "where a vessel, soon after leaving port, becomes leaky, without stress of weather or other adequate cause of injury, the presumption is, that she was unseaworthy before setting sail" (*The Warren Adams,* 74 Fed. 413) is, as the Court below correctly indicated, not a rule of law, but rather an inference of one fact drawn from another fact. The inference is proper only where no recent inspection of the ship was made, but it does not apply to a case like the instant one where the ship was thoroughly inspected both for classification purposes (96) and for the purpose of ascertaining her fitness for the particular voyage. The cases of *Work v. Leather,* 97 U. S. 379; *The Warren Adams,* 74 Fed. 413; *The Arctic Bird,* 109 Fed. 167, relied upon by appellees as illustrations of the contrary presumption, are all predicated upon the absence of previous inspection. All legal presumptions are predicated upon a definite and limited state of facts. The presumption of continuance applies to every case, where "the vessel had been inspected so as to establish seaworthiness", especially when she continued seaworthy for the first nine days, the last two of which were stormy. The retrospective inference of unseaworthiness at the inception must fail when it comes in conflict with the *fact* upon

which the Supreme Court bases the presumption of the continuance of seaworthiness.

SECOND. ASSUMING THAT THE SHIP WAS NOT IN FACT SEAWORTHY ON LEAVING ROTTERDAM, THE EVIDENCE SHOWS THAT THE OWNER USED DUE DILIGENCE TO MAKE HER SEAWORTHY.

Assuming now, for the sake of argument, that the evidence is not strong enough to show that the ship was in fact seaworthy when she sailed from Rotterdam, but that she had a latent defect which all the different surveyors who inspected her failed to discover, the evidence certainly and clearly shows that the owner used due diligence—and more—to make his ship seaworthy.

Before loading he made a written request to the consul of France at Rotterdam to designate two experts to make a survey of seaworthiness of the ship (124). The consul appointed two master mariners, Beaudry and Le Roy, who surveyed the interior and exterior of the vessel (125). The inspector of the owner's ships, a former sea captain and surveyor of the Nantes Tribunal of Commerce, and a man of vast experience in the surveying and stowage of ships (128) was personally sent to Rotterdam and examined the "Duc d'Aumale" in all her parts, first afloat and later in dry dock (129-137), and discovered two defective rivets in the bottom, which were at once renewed. He distributed the weight of the cargo in the lower

hold and between-deck in accordance with her lines (133), having been thoroughly familiar with the ship since her construction (129). Captain Girard, another inspector of the company's ships, was sent with Captain Plisson to Rotterdam to assist him in the survey (140). He also accompanied the experts appointed by the French consul in their survey and gave them every assistance (142); and did likewise with the survey of the Bureau Veritas (143). In addition to these surveys the owner had a classification survey made by the surveyor of the Bureau Veritas, a thoroughly qualified expert (96). As to the stowage, the evidence shows that the Rotterdam stevedores who made the stowage had very large experience in stowing such cargoes in such vessels (97); that they were appointed by the charterers; that many cargoes similar to the cargo of the "Duc d'Aumale" were stowed in Rotterdam in sailing vessels bound for San Francisco (85), and that, therefore, the Rotterdam stevedores had unusual experience in the stowage of such cargoes in similar vessels. It also appears that a stowage expert of extraordinary experience (Y. de Yonge, 84, 87), familiar with the "Duc d'Aumale" for stowage purposes (85), "arranged the stowage with the master and Mr. Hoogerwerff, who has had very large experience in stowing this class of cargo" (86), and superintended the work of loading with a view to the seaworthiness of the vessel.

In the light of this testimony it is difficult to see what other steps the owner of the "Duc d'Aumale" could have taken to insure the seaworthiness of the ship both as to her hull and the stowage of her cargo. The evidence shows that the owner used an abundance of due diligence to make the "Duc d'Aumale" in all respects seaworthy.

THIRD. ASSUMING THAT THE SHIP WAS NOT IN FACT SEAWORTHY ON LEAVING ROTTERDAM, BUT THAT THE OWNER USED DUE DILIGENCE TO MAKE HER SEAWORTHY, APPELLANT IS NOT LIABLE FOR THE REASON THAT THE PROXIMATE CAUSE OF THE DAMAGE WAS NOT UNSEAWORTHINESS, BUT FAULT IN NAVIGATION.

1. **The Proximate Cause of the Damage Was Not Unseaworthiness.**

Assuming, but not admitting, that the "Duc d'Aumale" was unseaworthy when she sailed from Rotterdam, and that, therefore, her owner is liable for the proximate damage caused by such unseaworthiness, the question is: What is the proximate result of such assumed unseaworthiness?

The first probable consequence of a defective rivet is that the sea will enter into the hold of the vessel and come into contact with the cargo. If, by coming into contact with cargo, the result is damage to the cargo, the owner of the ship is liable for such damage, it being the proximate or natural result of the failure of the owner to have his ship in seaworthy condition on sailing. Most

cases of cargo damage where shipowners are held liable are cases of this nature—cases where the damage is *caused by the unseaworthiness.* The instant case is, however, different in its nature: If the master had, after discovering the comparatively slight leak, returned to the port of departure or repaired to a neighboring port of refuge, the only consequence of the initial unseaworthiness would have been some damage to the ship, but no physical damage to the cargo carried by the "Duc d'Aumale". When, on September 29th, after a storm, the ship showed the first signs of trouble, and water was discovered in her bottom, she was off the coast of Portugal, and could easily have reached neighboring ports of refuge. A prudent master, finding himself in the position of the "Duc d'Aumale" on September 29th, could and would have avoided all damage to the cargo by taking his then unseaworthy vessel into a nearby port for repairs instead of continuing his long voyage through seas which every master knows to be stormy and dangerous for an unseaworthy ship. If the master of the "Duc d'Aumale" had been prudent and had taken the natural steps which can be expected of a master of ordinary caution, he would have taken his ship and her cargo into port and would have made repairs before proceeding on his course to the far-off destination. Had he done so, had he done what, in the natural course of events, was expected of him, the damage which later resulted to the cargo would have been

avoided. That damage is not, therefore, caused in a legal sense by any assumed initial unseaworthiness of the ship in the natural and reasonable course of events.

2. The Proximate Cause of Damage Was Fault in Navigation.

Most, if not all, the damage to the cargo was done while the vessel was submerged on the beach at Roy Cove between November 25, 1907, and February 13, 1908. It is probable that sea water reached the cargo between November 22 and November 25, after she had run into the violent gale; but the evidence shows that, from September 29th until November 22nd, the water in the bottom of the ship was controlled by regular pumping twice a day. The question arises: What was the legal or proximate cause of the sinking of the ship on and after November 22nd? The law looks only to the act or omission from which the result follows in direct sequence *without the intervention of a voluntary independent cause,* and permits no further investigation into the chain of events (*38 Cyc.,* 442). As soon as, in going back from November 22nd, a voluntary independent cause is met as a link in the chain of causation, the law goes no further, but considers this voluntary independent cause as *the* efficient cause of the sinking.

It is well settled that where, in going back in the chain of causation, we come upon the responsible

act or negligence of a third person, such act or negligence is considered to be the proximate cause. Applying this test, the cause of the sinking of the "Duc d'Aumale", which began on November 22nd, was the fault of her master, in the navigation of his ship, between September 29th and November 22nd. When he discovered the leak, his long journey had only begun, and he was still in favorable seas and within easy reach of safe ports where he could have found refuge and made repairs. The natural step which a prudent master would have taken under the circumstances was to have directed his course at once to such a port. He had complete control of the ship; her navigation lay within his exclusive judgment and power. If, on September 29th, he had merely failed to return to port, it might be possible to find a plausible excuse for his omission. At any rate his fault would have been negative. But when on each and every day thereafter, for nearly two months, he persisted on his course to the distant destination, exposing his leaking ship, day after day, to the uncertain perils of storms instead of first making his ship seaworthy when he had many opportunities to do so, his conduct may be properly characterized as wilful. And when we consider that he knew all the time that, on every successive day, he was approaching nearer to the seas which would probably be so turbulent as to try the mettle of the staunchest ships, his persistence on the course with an unseaworthy ship was an act of recklessness, repeated

every day and every hour. From the 29th day of September until the day before November 22nd, the master of the "Duc d'Aumale" interposed the deliberate act of a responsible human agent between the final damage to the cargo and an assumed latent defect which his ship may have had on leaving Rotterdam. On every day between September 29th and November 22nd, when the master had an opportunity to shape his course into a port of repairs, he deliberately and recklessly sent his ship nearer to the point where trouble was known to be lying in wait for her and her cargo. The proximate cause of the final damage was, therefore, any of these many voluntary acts of the master. "The proximate cause is the efficient cause, the one that *necessarily* sets the other causes in operation" (*Insurance Co. v. Boon,* 95 U. S. 117, *130*). It was the master's act of running deliberately into dangerous seas with a leaking ship that necessarily set in operation the storm of November 22nd and the consequent sinking of the ship.

Starting at the other end and applying the same test to the assumed unseaworthiness of the ship on leaving Rotterdam, it follows that, supposing that she had then a latent defect in one of her rivets, this would necessarily set in operation the leak which occurred on September 29th; in other words, the latent defect was the proximate cause of the *leak;* but it cannot be contended that either the latent defect or the leak necessarily set in operation a sinking of the vessel which occurred two

months later and which could and should have been avoided by proper navigation. In this respect the instant case is entirely different from the cases in the books where vessels spring a leak and at once begin to sink as the natural result of the leaks.

There can be no doubt that the proximate fault of the damage complained of by appellees is not unseaworthiness of the "Duc d'Aumale" (assuming that any existed), but is the positive fault, or rather series of faults, of her master, in directing the course of his wounded ship for months toward a danger which, in the natural course of events, was expected to lie in wait for him, and which he had numerous opportunities to avoid.

3. Hence Appellant Is Exempt by the Harter Act.

A. The master's acts constitute fault in navigation, within section 3.

That the determination of the master to proceed without putting in for repairs was a matter pertaining to the navigation and management of the vessel, within section 3 of the Harter Act, was decided by this Court in the case of *Corsar v. J. D. Spreckels & Bros. Co.,* 141 Fed. 260. In that case the ship "Musselcrag", in attempting to round Cape Horn, sprang a leak in a storm, and her cargo was damaged by the sea water entering into the hold. Her master finally abandoned the attempt to round the Horn, but continued her voyage by way of Cape of Good Hope. When her course was changed, the ship was within reach of Port Stanley, but failed to put in for repairs.

The question arose, whether this failure of the master to sail for the port of refuge and repair the ship before continuing his voyage was a fault or error in navigation or management within section 3 of the Harter Act, and the Court held that it was, saying:

> "The question confronting him was primarily and essentially one of navigation—how best, in view of the trying circumstances in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining this question was primarily and esentially one of navigation does not, in our opinion, admit of the slightest doubt."

In the case of *The E. A. Shores,* 73 Fed. 667, failure of the master to heed the warning of a government light, which indicated the location of a reef, and presuming the entire accuracy of the compass and the course, were held to be faults or errors of navigation within the meaning of section 3. *A fortiori,* in this case, the failure of the master, after his ship was crippled by the leak, to heed the warning of the notorious danger of the seas around Cape Horn, and presuming, against all the rules of chance, his ability to keep his leaking ship afloat through tempests which were to be expected, was a fault of navigation within section 3 of the Harter Act.

In *The Silvia,* 171 U. S. 462, an inside iron shutter to the port in a compartment having no cargo and easily accessible, but which ought to have

been closed in stormy weather, was knowingly left open by the officers before sailing, and no attempt was made to shut it on the approach of bad weather. It was held that the damage from sea water, which entered during the bad weather, resulted from "fault or error in the management of the vessel". There, as in the instant case on September 29th, it could be reasonably foreseen by the master or officers that, on the arrival of bad weather, the cargo would probably suffer. Failure to remedy this condition in the one case by making the ship water-tight on the ocean, where that could easily be done, in the other case by seeking a port of repairs, was a fault in navigation and management.

B. Section 3 exempts appellant from responsibility for the damage.

Section 3 of the Harter Act provides:

> "If the owner * * * *shall exercise due diligence* to make the vessel in all respects seaworthy * * * neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss *resulting from faults or errors in navigation or in the management of said vessel.*"

It has been held that, where the damage is *caused by the unseaworthiness* (though the defect be latent when the voyage began), the carrier is liable, in spite of having used due diligence (*The Carib Prince,* 170 U. S. 655).

But this does not apply to a case like the present one, where the damage was not caused by unseaworthiness, but was caused by the fault of naviga-

tion. In this case the principle governs which is stated by Judge Shiras in *The Irrawaddy,* 171 U. S. 187, *192,* in these words:

> "Plainly the main purposes of the act were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence and, *in event that he has exercised due diligence to make his vessel seaworthy,* to exempt him from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

Where, as in the instant case, the damage results or is caused by fault in navigation, the Act explicitly exempts the shipowner from liability for latent defects (assuming such defects to have been in existence when the voyage began), if the owner has exercised due diligence to make his vessel seaworthy.

Thus Judge Brown, of the Southern District of New York, says:

> "The supposition that the Supreme Court has held that in cases where the damage results from the specific causes named in the third section of the Harter Act (faults or errors in navigation, or in the management of the vessel), the owner is still responsible for the absolute seaworthiness of the ship as before, is, I think *mistaken.* I do not find any such adjudication, and the terms of the third section as respects damages, *resulting* from the causes mentioned in it, *are explicit to the contrary.* * * *
>
> In cases where the damage must be deemed to have 'resulted', not from any defect in the ship or the condition of the compartments as

> the efficient cause of the loss, but from some one or more of the causes specified in the third section as the real and efficient cause, the ship and owner are by the express terms of the act made answerable only for the exercise of due diligence to make the ship seaworthy."
>
> *The Manitoba,* 104 Fed. 145, 152.

The case of *The Carib Prince,* 170 U. S. 655, was cited by counsel for appellees in the Court below as being in conflict with our contention, but an examination will show that this case does not belong to the category of cases upon which we rely (Case 6 above), but that it is a case where the damage to the cargo is the direct and immediate result of the unseaworthiness of the vessel on leaving port; and it is therefore within the category of the cases we have distinguished as Case 5 above. Even in such cases the owner is exempted if he has used due diligence to make his vessel seaworthy and has reduced his liability by contract.

The case at bar, however, is an entirely different case; for here the proximate cause of the damage is independent of any duty imposed by the Harter Act upon the shipowner. The proximate cause of the damage to appellee's cargo was the aggravated fault of the master of the "Duc d'Aumale" in her navigation.

IV.

Conclusion.

We believe that the evidence shows sufficiently that the ship was in fact seaworthy in every respect

when she sailed from Rotterdam; if there be any doubt as to this contention, the evidence certainly shows conclusively that the owner of the ship used due diligence to make her seaworthy when she started on her voyage. The evidence also shows that the legal cause of the damage to appellee's cargo is the fault of the ship's master in her navigation. It follows that the owner of the ship is relieved from liability for the damage.

The decrees of the Court below should be reversed, and a final decree ordered in favor of appellant for the full amount of its freight, with interest and costs.

Dated, San Francisco,
October 4, 1917.

Respectfully submitted,

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